(3)

No. 83-18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

The issue presented in this case is whether the First Amendment's limitations on the award of presumed and punitive damages for libel, recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to "non-media" defendants. The questions presented for review are:

I. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed compensatory damages or "general" damages for libel against a "non-media" defendant absent a showing of "actual malice"?

II. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover punitive damages for libel against "non-media" defendants under a standard of liability less demanding than the "actual malice" standard of *New York Times v. Sullivan*?

III. Did the trial court's instructions on presumed and punitive damages in this libel action violate the First and Fourteenth Amendments?

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The order and opinion of the Supreme Court of the State of Vermont is not yet officially reported. It is reported unofficially at 461 A. 2d 414 (1983), reprinted in the Joint Appendix at 31-46.

The order of the Superior Court of Washington County, Vermont granting Dun & Bradstreet, Inc.'s motion for new trial is unreported. It is reprinted in the Joint Appendix at 25-27.

GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976). The order and opinion to be reviewed was dated and entered by the Supreme Court of Vermont on April 15, 1983. On July 8, 1983, and within the time specified under 28 U.S.C. § 2101(c) (1976), Petitioner filed its petition for a writ of certiorari. By order of November 7, 1983, this Court granted the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I, which provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

U.S. Const. amend. XIV, § 1, cl. 2:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a libel action brought by Greenmoss Builders, Inc. ("Greenmoss") against Dun & Bradstreet, Inc. ("D&B"),[1] Petitioner herein, a publisher of financial reports.[2] The action was brought in the state courts of Vermont and was tried before a jury. The jury returned a verdict for Greenmoss in the amount of $50,000.00 compensatory damages and $300,000.00 punitive damages.

1. The Facts

D&B publishes financial and related information concerning businesses to its subscribers. As part of a continuous service, D&B publishes "Special Notices" to subscribers interested in a particular business. On July 26, 1976, D&B reported in a Special Notice (J.A. 13) to five of its subscribers that Greenmoss had filed a voluntary petition in bankruptcy.[3] None of the five subscribers was a customer of Greenmoss.

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[1] Dun & Bradstreet, Inc. is a wholly owned subsidiary of The Dun & Bradstreet Corporation. The non-wholly owned subsidiaries of The Dun & Bradstreet Corporation are Donnelly & Gerrardi Verwaltungs-GmbH., Donnelley & Gerrardi GmbH. & Co. K.G., Dun & Bradstreet S.L., and Dun & Bradstreet A.G. Affiliates of Dun & Bradstreet International, Ltd., a wholly owned subsidiary of The Dun & Bradstreet Corporation, are: Thomson Directories Ltd., Thomson Directories, Thomson Sales & Service Ltd., DBH Wirtschaftsdatenbank GmbH., Dun & Bradstreet (HK) Limited, and Telemarketing Italia S.p.A.

[2] D&B publishes financial and other information concerning businesses. It is not a consumer reporting agency.

[3] If a D&B subscriber has received information on a particular business within twelve months of the issuance of a Special Notice, that subscriber will automatically receive the Special Notice. Here, the Special Notice concerning Greenmoss was sent to the

On August 3, 1976, eight days after the publication of the Special Notice, Greenmoss' president, John Flanagan, contacted D&B's regional office in Manchester, New Hampshire, and advised D&B that the Special Notice was in error. On that same day, D&B issued a retraction in the form of a "Correction Notice" (J.A. 15) explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself. D&B sent the Correction Notice to each of the five subscribers who had received the original Special Notice.

2. The Proceedings Below

The complaint[4] alleged that D&B erroneously reported that Greenmoss had filed a voluntary petition in bankruptcy and that the Special Notice "grossly misrepresented the assets and liabilities of the corporation . . . ." Greenmoss claimed that it had suffered damages, humiliation, injury and loss to its business reputation and standing in the community. Its complaint demanded $7,500.00 in compensatory damages and $15,000.00 in punitive damages. (J.A. 5-7)

At trial, Greenmoss introduced the deposition testimony of Julie Mullen, the employee of D&B who customarily reviewed bankruptcy petitions in Vermont.

Howard Bank, American Express Company, State Mutual Insurance Company, Goodyear Tire and Rubber Company, and Aetna Insurance Company.

[4] The complaint was originally filed on behalf of Greenmoss and its president, Mr. Flanagan. Plaintiffs made identical allegations and sought identical damages. By order dated January 23, 1980, the trial court granted D&B's motion to dismiss Mr. Flanagan as a party plaintiff. (J.A. 1)

(Tr. 287-326)[5] Ms. Mullen's apparent misreading of the Greenmoss employee's petition had caused the erroneous Special Notice to be issued. There is *no evidence* in Ms. Mullen's testimony or in any other part of the record that D&B published the Special Notice with reckless disregard for the truth or with actual knowledge of falsity. Her good faith was never questioned.

Greenmoss did not offer testimony from any of the five subscribers or from any other disinterested person to prove that the publication of the Special Notice caused damage. The company's sole evidence on damages and injury was the testimony of its former president, John Flanagan, who had a pecuniary interest in the outcome of the case. Mr. Flanagan conceded that the company's most profitable year was the year that followed D&B's erroneous report. (Tr. 143) Nevertheless, he speculated that although the company's sales and profits had increased after the Special Notice, they had fallen short of expectations. He also estimated that the company had incurred expenses of $2,000 - $5,000 in contacting individuals to refute the erroneous information. (Tr. 174) Even so, there was no evidence establishing a causal connection between the publication of the Special Notice to the five subscribers, none of whom were customers of Greenmoss, and the company's alleged injury and damages.

Greenmoss contended that the Special Notice had prompted one of the subscribers, a bank, to terminate its lending relationship with the company. But a representative of the bank, called by D&B, testified that

[5] "Tr." signifies citations to pages of the separately-numbered trial transcript included in the Record.

when he received the Special Notice he did not believe it. He confirmed that day with Mr. Flanagan that Greenmoss was "still alive and kicking and [wasn't] bankrupt." (Tr. 212-13) He testified that he was the only bank officer who saw the Special Notice, that he favored making the pending loan to Greenmoss, but that two senior officers from the bank's home office declined to make the loan for reasons wholly unrelated to the Special Notice.[6] (Tr. 212-13, 215-16, 253-54)

[6] The bank's representative testified as follows concerning the two senior officers' refusal to make the loan to Greenmoss:

> The concerns expressed by senior officers who judged this request, they were concerned regarding the high debt to worth ratio, which is a ratio of the total debt of the Corporation divided into their net worth. Their working capital was not sufficient for the level of sales that they had. There was some shareholder loans that either had to be subordinated or converted into equity, and this probably was not possible under Subchapter S. The existing mortgage that we had we felt was the maximum for the value we believe the property had. We would not advance any additional funds on that building.
>
> * * *
>
> Q. Is it fair then to say, Wayne, that the reason that the loan was declined is that the Howard Bank ultimately decided that it was in jeopardy of [not] being repaid should the line of credit be extended?
>
> A. That was the decision, yes.

(Tr. 253-54)

There is no record support for the statement of the Vermont Supreme Court that "the bank put off any future consideration of credit to plaintiff until the discrepancy was cleared up." (J.A. 34-35)

The trial court instructed the jury that this was an action for libel *per se* and that damages, therefore, were presumed:

> Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous per se. This means that the *Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed.*

(J.A. 17) (emphasis added). Later the Court added:

> Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; *where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven*, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although *the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred*, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as

> you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

(J.A. 19) (emphasis added). Thus, the trial court's instructions on libel *per se* permitted an award of presumed damages and relieved Greenmoss of the necessity of proving damages by specific proof.

The trial court also instructed the jury that it could award punitive or exemplary damages upon a finding that D&B acted with "actual malice." The court did not define "actual malice." Instead, it defined "malice" as follows:

> If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously . . . .

(J.A. 18-19) (emphasis added). That instruction allowed the jury to award punitive damages without convincing proof of knowledge of falsity or reckless disregard for the truth.

D&B timely objected to the court's instructions on libel *per se* and punitive damages.

After hearing the trial court's charge, the jury returned a verdict for Greenmoss in the amount of $350,000.00, consisting of $50,000.00 compensatory damages and $300,000.00 punitive damages. (J.A. 2) The $50,000 "compensatory" damage award exceeded Greenmoss' own evidence of actual damages. Greenmoss projected only $31,000 in lost profits ($50,000 "projected" profits less $19,000 profits actually

earned), plus expenses not in excess of $5,000. (Tr. 97-99) Thus, a substantial portion of the "compensatory damages" award did not even represent *alleged* actual damages.

After the verdict, D&B filed a timely motion for a new trial. (J.A. 2) D&B asserted that the trial court's instructions permitted the jury to award presumed damages and authorized the jury to award punitive damages based on less demanding proof than the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The trial court granted D&B's motion for a new trial on all issues and concluded that its jury instructions had not met the standards of *Gertz*:

> The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language in the charge may have misled the jury to believe that damages were presumed in some amount in the case. The United States Supreme Court held in *Gertz v. Robert Welch*, 418 U.S. 324:
>
> > "The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."
>
> Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that

> damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.
>
> Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

(J.A. 25-27) (emphasis in original).

After other post-trial proceedings, the trial court granted Greenmoss' motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions concerning its order granting a new trial. (J.A. 29-30) The issue underlying the certified questions was the applicability of *Gertz* to "non-media" defendants.

On appeal, the Vermont Supreme Court did not question the trial court's conclusion that the jury instructions were misleading under the standards announced in *Gertz*. Rather, the Vermont Supreme Court held that the constitutional limitations on presumed and punitive damages derived in *Gertz* from the First and Fourteenth Amendments were inapplicable. The Vermont Supreme Court characterized D&B as a "non-media defendant" and held:

> [W]e hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

. . . .

"When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation . . . ."

461 A.2d at 418, 419 (J.A. 40, 42) (citations omitted). As a result, the Vermont Supreme Court held that the trial court erred in granting a new trial and that the trial court should have entered judgment on the verdict.

SUMMARY OF ARGUMENT

The Vermont Supreme Court improperly held that limitations on presumed and punitive damages announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply only to the "media." In its opinion, the court ignored this Court's holding in *Gertz* that, absent actual malice, the state interest in compensating private defamation plaintiffs extends no further than compensation for actual injury.

The Constitution protects all defamation defendants against presumed and punitive damages in the absence of actual malice. Neither the language nor the history of the First Amendment suggests that any group should have more freedom of speech or of the press than others. This Court has been historically reluctant to give any class of speakers special First Amendment rights. Giving the "media" a preferred constitutional status would tend to undermine, rather than to support, the values embodied in the First Amendment.

Furthermore, the Vermont Supreme Court's "media"/"non-media" distinction is unsound and unworkable. In practice, the judiciary's efforts to divide defendants into "media" and "non-media" classes would

lead to *ad hoc*, inconsistent results in all but the most obvious cases. In their search for an analytical framework for the problem, the lower courts would likely focus on the nature of the speech concerned. That, in turn, would resurrect the "public interest" test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Adopting a "media"/"non-media" dichotomy would contradict *Gertz*, which was prompted by dissatisfaction with the *Rosenbloom* approach.

No legitimate state interest justifies a rule that limits the liability of newspapers, magazines, and broadcasters, while subjecting other speakers to greater exposure. Because the lower court authorized presumed and punitive damages where no actual malice existed, and because the rules announced in *Gertz* should apply to all defamation defendants, the judgment of the Vermont Supreme Court should be reversed, and a new trial should be ordered.

ARGUMENT

THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT THE AWARD OF PRESUMED AND PUNITIVE DAMAGES ABSENT A SHOWING OF ACTUAL MALICE.

I.

The Vermont Supreme Court Wrongly Refused To Apply First Amendment Limitations On Defamation Damages Recognized In *Gertz v. Robert Welch, Inc.*

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court sought to define "the proper accomodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Id.* at 325. *Gertz* involved a libel action against the publisher of a magazine article which had described the plaintiff as a Communist sympathizer and participant in various Communist organizations and activities. Holding that the plaintiff was a "private individual" and not a "public official" or "public figure," this Court held that the trial court had erred in applying the actual malice rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Court held that the states were free to define their own standards of liability in cases involving defamation of private individuals "so long as they do not impose liability without fault . . . ." 418 U.S. at 347.

In *Sullivan*, the Court had focused on the public or private status of the plaintiff to determine applicability of the actual malice liability standard. In *Gertz*, the Court returned to that analytical framework, rejecting the *ad hoc*, content-based approach of the plurality in

Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). 418 U.S. at 343-44. The Court doubted the wisdom of committing to the judiciary issues of "which publications address issues of 'general or public interest' " or of " 'what information is relevant to self-government.' " *Id.* at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)). The Court was also concerned that adherence to *Rosenbloom*

> would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

418 U.S. at 343-44; *see id.* at 354 (Blackmun, J., concurring) (definitive ruling in defamation area deemed "paramount" and "of profound importance").

Although in *Gertz* it refused to require private plaintiffs to meet the *Sullivan* actual malice standard for liability, the Court declined to reinstate a jury award based on presumed damages. Acknowledging the "strong and legitimate state interest in compensating private individuals for injury to reputation," the Court nevertheless found that the interest "extends no further than compensation for actual injury." *Id.* at 348-49. The Court reasoned:

> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is

> necessary to protect the legitimate interest involved. *It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.*

Id. at 349 (emphasis added). Accordingly, state remedies for defamation were held subject to First Amendment limitations on presumed and punitive damages. *Id.* at 350.

The Court recognized that recovery of presumed damages under the common law of defamation is an "oddity of tort law":

> Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. *The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.* Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. *More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.*

Id. at 349 (emphasis added).

The Court was equally concerned with the effect of punitive damages in defamation actions. Like presumed damages, punitive damages—in reality civil fines—were irrelevant to the state interest in compensation for actual injury and threatened the same uncontrolled jury discretion.[7] *Id.* The Court therefore held:

> In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

Id. at 350. Because the jury in *Gertz* "was allowed to impose liability without fault and was permitted to presume damages without proof of injury," the Court ordered a new trial. *Id.* at 352.

In this case, the trial court ordered a new trial for the same reason. It found that its charge authorized presumed and punitive damages absent knowledge of falsity or reckless disregard for the truth, and failed to comport with *Gertz*. The Vermont Supreme Court dis-

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[7] As Justice Harlan wrote in *Rosenbloom*:

> At a minimum, even in the purely private libel area, . . . the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, see, *e.g.*, 3 L. Frumer, et al., Personal Injury § 2.02 (1965); H. Oleck, Damages to Persons and Property § 30 (1955), and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment.

403 U.S. at 73 (Harlan, J., dissenting).

agreed with the trial court's decision to grant a new trial. Drawing a distinction between "media" and "non-media" defamation, the Vermont Supreme Court determined that *Gertz* applied only to "media" defendants.

The Vermont Supreme Court ignored *Gertz*'s unequivocal pronouncement that, absent actual malice, "the States have *no substantial interest* in securing for [private] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349 (emphasis added). The decision on review assumes that the States have a legitimate interest in overcompensating victims of "non-media" defamation, even where the defendant acted without actual malice. This Court's clear holding to the contrary in *Gertz* makes that assumption untenable. For that reason alone, the lower court's decision should be reversed, and D&B should be granted a new trial.

II.

The Vermont Supreme Court's "Media"/"Non-Media" Distinction Is Unsound And Unworkable.

A. The First Amendment Protects Freedom Of Expression And Does Not Accord Special Treatment To Any Group Of Speakers.

Neither the language nor the history of the First Amendment supports the view that "media" expression should be exalted above other speech. *See generally* Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. Rev. 77 (1975). Nor is there anything in the First Amendment to suggest that what the communications industry has to say is more worthy of constitutional protection than the words of merchants,

scientists, or machinists. The lower court's decision, however, would accord special treatment to an undefined class of "media" speakers. Other speakers would be subject to unlimited exposure for defamation, even where no actual malice existed.

In a variety of contexts, this Court has refused to acknowledge favored classes of speakers with greater constitutional protection than the ordinary citizen. " '[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .' " *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978) (*quoting Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). *See Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972)); *accord Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("[T]he basic principles of freedom of speech and the press . . . do not vary.").

> The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell v. Griffin, supra*, 303 U.S. at 451-452, 58 S.Ct. at 668-669. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fer-

vor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of Press Clause protection. Indeed, the Court has plainly intimated the contrary view:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704-705, 92 S.Ct. 2646, 2668, 33 L.Ed.2d 626 (1972), quoting *Lovell v. Griffin, supra*, 303 U.S., at 450, 452, 58 S.Ct., at 668, 669.

Bellotti, 435 U.S. at 801-02 (Burger, C.J. concurring).

The holdings in *Sullivan* and *Gertz* were not expressly limited to the "media."[8] *Sullivan* applied the

[8] In *Sullivan*, the Court's opinion began by declaring that, "We are required in this case to determine for the first time the extent to which the constitutional protections for *speech and press* limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." 376 U.S. at 256 (emphasis added). In *Gertz*, the Court spoke of its struggle "to define the proper accomodation between the law of defama-

same actual malice test not only to *The New York Times*, but also to the persons whose names had appeared in the advertisement at issue. *Sullivan*, 376 U.S. at 286. *Accord St. Amant v. Thompson*, 390 U.S. 727 (1968) (*Sullivan* test applied in case involving individual defendant not a member of the press); *Henry v. Collins*, 380 U.S. 356 (1965) (*Sullivan* test for liability applied to a private individual's statements).

More important, the justifications for limiting presumed and punitive damages—the absence of state interest and the fear that uncontrolled jury discretion would inhibit the exercise of First Amendment freedoms—do not depend upon the identity of the speaker. The need to avoid punishing the free flow of information exists regardless of the medium through which the information flows. The First Amendment safeguards individual freedom of expression, not the promotion of specialized groups of communicators. As Chief Justice Burger wrote in his concurring opinion in *Bellotti*:

> Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the

tion and *the freedoms of speech and press* protected by the First Amendment." 418 U.S. at 325 (emphasis added). Later in the *Gertz* opinion, the Court restated its concern "to assure *to the freedoms of speech and press* that 'breathing space' essential to their fruitful exercise." 418 U.S. at 342 (emphasis added) (citations omitted.)

> press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ' . . . the liberty of the press is no greater and no less . . .' than the liberty of every citizen of the Republic."

435 U.S. at 801-02 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)). *See also* Comment, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 Ohio St. L. J. 149, 167 (1983) ("The Supreme Court has consistently viewed the different first amendment freedoms as merely different aspects of the same guaranty—the right of free expression."); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1885 (1982) ("Creating a mediaocracy contradicts the principle of equal liberty of expression: in a free society, everyone should have an opportunity to present her ideas in the marketplace."); Lewis, *A Preferred Position For Journalism?*, 7 Hofstra L. Rev. 595, 605 (1979) ("No Supreme Court decision has held or intimated that journalism has a preferred constitutional position.")[9]

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[9] Anthony Lewis has also noted:

> Blackstone, recording the successful outcome of the long English struggle against press censorship, wrote: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. . . ." Every freeman, that is, not just those organized or institutionalized as "the press." Freedom of the press arose historically as an individual liberty. Eighteenth-century Americans saw it in those terms, and the same view is reflected in Supreme Court decisions; freedom of speech and of the press, Chief Justice Hughes said, are "fundamental personal rights." To depart from that principle—to adopt a corporate view of the freedom of the press, applying the press clause of the first amendment on special terms to the "institution" of the news media—would be a drastic and unwelcome change in American constitutional premises. It would read the Constitution as protecting a particular class rather than a common set of values, and we have come to understand, after much struggle, that the Constitution "neither knows nor tolerates classes among citizens."

Lewis, *supra* p. 20, at 625-26 (footnotes omitted).

Professor Lange has other, no less compelling, fears:

> [I]ndividual interests in speech may be even more seriously threatened by separate constitutional status. With no distinct institutional identification—and now without claim to immediate theoretical alliance with the press—they may find it more difficult to stand up against the constraints which a mass society inevitably finds it convenient to impose.

Lange, *supra* p. 16, at 113 (footnote omitted).

B. Affirming The Lower Court's Decision Would Lead To *Ad Hoc*, Inconsistent Rulings Dependent Upon Undesirable Assessments Of Particular Speakers' Messages.

The Vermont Supreme Court's "media"/"non-media" dichotomy creates practical problems no less important than the concerns expressed above. If the application of First Amendment limitations on presumed and punitive damages would now require a threshhold ruling as to the *defendant's* status, the judiciary will be forced to determine who is and who is not a member of the "media." That determination will add further complexity to an already overly complex tort.[10]

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[10] The "media"/"non-media" issue would doubtless require factual development, prompting further discovery, forcing additional briefs, and, in general, making cases of this sort even more expensive—in time, money, and resources—than they already are.

In all but the most obvious situations, the "media"/"non-media" distinction would be impossible to apply. Courts grappling with the issue would be forced to answer a variety of questions. For example, would the size of the speaker's audience be determinative? If the speaker's audience were small, could the stature of the audience entitle the speaker to greater constitutional protection than that available to speakers addressing less influential groups? What should a court do with an individual who earns a livelihood by making speeches to select groups of leading academics or business executives? Would a columnist in a trade or professional journal be more entitled to the appellation "media" than such a speaker? How should the courts treat the person who blurts out a defamatory quip on a television talk show? Would occasional contributors to newspapers be regarded as "media" when repeating their own published statements in a private letter to a friend? Faced with such questions, courts would inevitably reach conflicting decisions.[11] The probable result

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[11] As the Court observed in *Branzburg v. Hayes*, 408 U.S. 665 (1972):

> The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

Id. at 703-04.

would be the very uncertainty and unpredictability the Court had hoped to dispel when it decided *Gertz*.[12]

In their search for the decisive factor, the lower courts would likely find themselves deciding the "media" issue by asking whether particular speakers' messages could be expected to have general interest or mass appeal. The dangers of that approach are obvious. Focusing on general interest or appeal permits unjust discrimination according to the decision-maker's values. Unpopular speech could be given less protection, not because it is less important, but only because it is less popular.

The Court has acknowledged the First Amendment's hostility to content-based regulation. *See Police Department v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *United States Postal Service v. Counsel of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (valid restrictions on time, place and manner of speech must be "content-neutral"); *see generally* Note, *supra* p. 20, at 1880-82 (anti-content-regulation principle is "implicit in the Court's first amendment cases"), and cases cited. Judicial attempts to regulate content interfere with a process that the First Amendment reserves to the marketplace of ideas. *See Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 903 (1971) (Douglas, J., dissenting) ("[I]f the rough and tumble of debate is the best vehicle for producing approximations of fac-

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[12] "[I]t is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority that eliminates the unsureness engendered by *Rosenbloom*'s diversity." 418 U.S. at 354 (Blackmun, J., concurring).

tual truth or preferred opinion, the courts have no business making premature and interim evaluations of contested statements' merits.").

It was the Court's dissatisfaction with content regulation that led it to abandon the short-lived *Rosenbloom* "public interest" test. *Gertz*, 418 U.S. at 346 (discussed at pp. 12-13, *supra*). *See also Sullivan*, 376 U.S. at 271 ("The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.' ") (*quoting NAACP v. Button*, 371 U.S. 415, 445 (1963)) *Time, Inc. v. Hill*, 385 U.S. 374 (1967); (applying *Sullivan* rule to *Life* magazine review of play); Shiffrin, *Defamatory Non-media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 926 (1978) ("*Gertz* plainly states that communications which are deemed to have nothing to do with self-government and which do not relate to public issues fall within the ambit of first amendment protection. . . .").

The Vermont Supreme Court's "media"/"non-media" distinction is nothing more than content regulation couched in terms of interest balancing. *See* Note, *supra* p. 20, at 1885-86 ("[P]rotecting speakers based on their media status is a device for protecting political messages; it is content regulation by another name."). Citing language reminiscent of the *Rosenbloom* plurality, the Vermont Supreme Court regarded D&B's Special Notice unworthy of protection because it involved

> "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."

(J.A. 39) (citation omitted). That language signals a return to the concepts the Court found inadequate in *Gertz*.[13]

The lower court regarded "political speech" as the First Amendment's sole concern. But the Constitution protects far more than that:

> It is no doubt true that a central purpose of the First Amendment " 'was to protect the free discussion of governmental affairs.' " *Post*, at 1811, quoting *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659, and *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484. But our cases have never suggested that expression about philosophical social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

Abood v. Detroit Board of Education, 431 U.S. 209, 231 (1977); *see also Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed

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[13] Prior to *Gertz*, some courts had applied *Rosenbloom's* now discarded "public interest test" to deny First Amendment protection to financial reports. *See Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3rd Cir.) ("business or credit standing" held not a "matter of real public interest"), *cert. denied*, 404 U.S. 898 (1971); *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972). These decisions involved precisely the type of *ad hoc* content-based adjudication ended by *Gertz*.

as appropriate to enable the members of society to cope with the exigencies of their period.")

As one commentator has aptly stated:

> [A]llocating protection on the basis of political content is repugnant to the very purpose of the first amendment, for such allocation will follow majoritarian impulses. The "political" label can be not only stretched to protect popular messages, but also shrunk to chill unpopular messages. Majorities, however, do not need a constitutional amendment to protect their speech; they can secure statutory protection by pressuring their popularly elected legislators. It is minorities who need a structural provision to shield their messages, regardless of who is in power. No majority is wise or benevolent enough to determine which speech is important and which is not. By enhancing the free flow of all messages, the first amendment ensures that everyone—majorities and minorities—can help to generate the ideas "members of society [need] to cope with the exigencies of their period."
>
> . . . .
>
> Individuals need information about the reputations of other members of the groups they interact with at least as much as—if not more than—they need information about the character of candidates for public office. Ordinary speakers require breathing space for nonpublic speech just as the media require it for public speech. . . ."

Note, *supra* p. 20, at 1881, 1894 (footnotes omitted).

Even if the First Amendment permitted the type of judicial favoritism to "public" or "political" speech the

Vermont Supreme Court would give it, distinguishing between "media" and "non-media" defendants does not serve that purpose. There is no reason to believe that a message broadcast by a "media" voice promotes public or political goals any better than the message of a "non-media" speaker. To the contrary:

> Public issues can be debated with as much force among individuals as in the press. . . . [T]he mass press does not originate ideas; it spreads them around, shaping, leveling, and smoothing them in the process. . . . The process has its uses, to be sure, but someone must still dig. And in the field of human ideas and their original expression, that function belongs first to individuals. . . . Nonmedia speech is always the antecedent of media speech. . . . [I]t is not sensible to treat two speakers differently merely on the ground that one proposes to speak privately while one intends to use the media.

Lange, *supra* p. 16, at 116-17 (footnote omitted). *Accord Jacron Sales Co. v. Sindorf*, 276 Md. 580, 592, 350 A.2d 688, 695 (1976) ("Issues of public interest may equally be discussed in media and non-media content, and the need for a constitutional privilege, therefore, obtains in either case."); Restatement (Second) of Torts § 580A comment h (1976). "[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978).

C. First Amendment Limitations On Presumed And Punitive Damages Should Apply Uniformly To All Speakers.

The Court's analysis in *Gertz* permits no distinction between the "media" and everyone else:

> [T]he reasons given by the Court for its hostility to strict liability for innocent defamation by the press would seem equally appropriate to innocent defamation by non-media defendants, especially where an individual's defamatory statement is likely to cause *less* harm because of its more limited dissemination. In addition, imposition of strict liability upon individuals who are apt to be both less circumspect in their name-calling and less aware of the risk of liability and thus less likely to insure against it, seems to make less sense as a matter of tort law than imposing strict liability upon large enterprises whose daily operations pose a substantial risk of predictable harm.

Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1418 (1975) (emphasis added) (footnote omitted). *Accord* Collins & Drushal, *Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 Case W. Res. L. Rev. 306, 334 (1978); Wade, *The Communicative Torts and The First Amendment*, 48 Miss. L. J. 671, 699-700 (1977).

> The rationale behind the constitutional defamation privileges is based on the premise that the fear of a potential defamation lawsuit will inhibit first amendment activity. The rationale is applicable to all forms of speech.

Comment, *supra* p. 20, at 184. *Accord* Yasser, *Defamation as a Constitutional Tort: With Actual Malice for All*, 12 Tulsa L. J. 601, 625 (1977) ("A constitutional privilege is applied across the board and not nibbled away.")

A "media"/"non-media" distinction would promote injustice. "Media" and "non-media" defendants tried together would be governed by different standards. A newspaper publishing an individual's statement verbatim could "create" a constitutional privilege that would not otherwise apply.[14] Another individual who then repeated the newspaper's statement without knowledge of any falsity could then be held liable for both presumed and punitive damages.[15] Or, as in this case, the same information published by D&B would be judged differently if published in a local newspaper.

The Court should, therefore, take this opportunity to make explicit what *Gertz* already implicitly commands:

> The "ultimate expansion of *Gertz* to provide equal standards of recovery against both media and non-media defendants seems predictable" if, in fact, one can call it an "expansion" at all. The well-established theory of our Constitution appears to be that "every citizen may speak his mind and every newspaper express its view." The

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[14] *See* Comment, *supra* p. 20, at 171 ("It is absurd to consider that a letter published in a letters-to-the-editor column of a newspaper would be constitutionally protected, while the same words spoken to a friend or neighbor would not.") (footnote omitted).

[15] Under common law notions of libel, an individual finding himself in that predicament very likely would be unable to recover contribution from either the "media" defendant or the original publisher, since contribution lies only among joint tortfeasors, while the common law regards each defamatory publication as a separate tort. *See Howe v. Bradstreet Co.*, 135 Ga. 564, 565, 69 S.E. 1082, 1083 (1911) ("If the original publisher does not participate in a republication of the libel by another, he is not liable in a joint action with the second publisher.")

> case law clearly supports the view that the constitutional privilege is as available to the non-media defendant as to the media defendant.

Yasser, *supra* p. 29, at 624 (footnote omitted).

The result Petitioner seeks is the natural consequence of existing doctrine:

> [T]he goal of first amendment theory should be to equate and reconcile the interests of speech and press, rather than to separate them. This is scarcely to suggest a new theory; there are as many examples of how this might be done as there have been cases referring to "freedom of expression" or turning on "freedom of speech and press." If anything "new" is needed, it is probably a clearer understanding of the risks which may be incurred when the reference point is something less than these concepts.

Lange, *supra* p. 16, at 118.

Commentators have implored the Court to remove all doubts that *Gertz* applies to everyone:

> [T]he distinction between the press and the rest of us will simply not hold up, either on historical or practical grounds.
>
> . . . .
>
> The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it.
>
> . . . .
>
> [One] . . . reason to believe the Court will be obliged to generalize the *Gertz* solution to cover all cases of injury to reputation is the Court's

> gradually increasing awareness that many of the traditional methods of distinguishing among types of speech do not make much sense.
>
> . . . .
>
> *The only way to accomodate all the conflicting interests in a manner that is socially acceptable, therefore, will be to generalize the Gertz negligence and actual damage solution.*

Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43, 58, 63, 64, 66 (1976) (emphasis added) (footnote omitted). *Accord* Collins & Drushal, *supra* p. 28, at 333-34; Yasser, *supra* p. 29, at 623-26; Comment, *supra* p. 20, at 169; 52 Wash. L. Rev. 915, 935 (1978).

The Court has already considered the tension between the First Amendment and the law of defamation. In *Gertz*, it struck a balance which fairly serves the competing interests of free speech and personal reputation. The Court achieved that accomodation by focusing on the status of the plaintiff, not the speaker or the message. The Court should not depart from that approach and embark again upon the ill-fated and analytically unacceptable course the Vermont Supreme Court has charted. Instead, the time has come to carry *Gertz* to its logical conclusion. The only way to reach a just result is to apply the same constitutional limitations on damages to every defamation defendant.

CONCLUSION

Based upon the foregoing, Petitioner Dun & Bradstreet, Inc. respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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Of Counsel

JOINT APPENDIX

No. 83-18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Vermont

JOINT APPENDIX

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Petition for Writ of Certiorari Filed July 8, 1983
Certiorari Granted November 7, 1983

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STATE OF VERMONT
WASHINGTON SUPERIOR COURT

Greenmoss Buiiders, Inc.,	:	
	:	
v.	:	Docket No. S326-77WnC
	:	
Dun & Bradstreet, Inc.	:	

Relevant Docket Entries

Filing or Order Date	
October 21, 1977	Summons, Complaint & Return of Service filed.
November 21, 1977	Entry of Appearance; Answer & First Defense-Sixth Defense filed by Peter Monte.
January 23, 1980	Motion to Dismiss as to the individual plaintiff, John Flanagan is GRANTED.
April 8, 1980	Defendant's Request to Charge Jury and Memo of Law Concerning Existence & Nature of Qualified Privilege filed by Attorney Monte.
April 9, 1980	Plaintiff's Request to Charge filed.

April 9, 1980

Plaintiff's Verdict

In this cause the jury on their oath say the Defendant is liable in manner and form as the Plaintiff has alleged in its complaint; They therefore find for the Plaintiff to recover of the Defendant $350,000.00 dollars, damages.

If punitive damages are allowed and represent any portion of the total damages set forth above, please indicate below the dollar amount allowed for punitive damages,

$300,000.00

Signed,

Vivian Bryan, Foreperson

April 22, 1980 — Judgment filed and copies mailed to counsel.

April 30, 1980 — Post-Trial Motions Under Rules 50 and 59 & Defendant's Memorandum in Support of Post-Trial Motions Under Rules 50 and 59 filed by Attorney Monte.

May 12, 1980 — Hearing on all post-judgment motions; Hayes, J.; Hall, R.; Attorney Monte requested transcript of hearing per Reporter Hall.

October 20, 1980 — Order filed and copies mailed to counsel;

It is hereby ORDERED and ADJUDGED:

That all motions of the Defendant for judgment notwithstanding the verdict are DENIED;

That Defendant's motion for a new trial on all issues is GRANTED.

October 29, 1980 — Memorandum of Law & Petition for Permission to Appeal filed by Attorney Heilmann.

April 29, 1981 — Order filed and copies mailed to counsel 4/29/81;

It is hereby ORDERED and ADJUDGED that the Plaintiff's Motion for Permission to Appeal and the alternative requests of the Defendant are GRANTED.

SUPREME COURT OF THE STATE OF VERMONT
(Title omitted in printing)

Relevant Docket Entries

Filing or Order Date	
April 15, 1983	Order and Opinion of the Supreme Court of the State of Vermont dated April 15, 1983

STATE OF VERMONT
WASHINGTON COUNTY, SS.

GREENMOSS BUILDERS, INC. and JOHN FLANAGAN	VERMONT SUPERIOR COURT WASHINGTON COUNTY Civil Action Docket No. ____
vs.	
DUN & BRADSTREET, INC.	

COMPLAINT

1. Plaintiff Greenmoss Builders, Inc., is a corporation organized and existing under the Laws of the State of Vermont with its principal place of business in Waitsfield, Vermont.

2. Plaintiff John Flanagan is a citizen and resident of Vermont residing in Waitsfield, Vermont. In 1971 plaintiff Flanagan created Greenmoss Builders and did business under said style until 1973 when Greenmoss Builders, Inc., was incorporated under the laws of the State of Vermont. Plaintiff Flanagan is the President, principal shareholder and prime moving force of said corporation. The members of the public in the community wherein the plaintiffs transact their business identify plaintiff Flanagan with Greenmoss Builders and acknowledge that plaintiff Flanagan as owner of said corporation, has a proprietory interest therein.

3. Defendant Dun and Bradstreet, Inc., is, upon information and belief, a corporation organized and existing under the Laws of the State of Delaware with its

principal place of business in New York. Among the business activities of defendant Dun & Bradstreet is the collection and dissemination of economic information concerning various business concerns to its subscribers.

4. On July 26, 1976, Dun & Bradstreet carelessly and negligently and with reckless disregard for the truth, informed its subscribers by means of a Special Notice, that Greenmoss Builders, Inc., had filed a voluntary petition in bankruptcy under Chapter 4 of the Bankruptcy Act. Defendant Dun & Bradstreet undertook no investigation to determine the truth of the information circulated by it which information was untrue at the time of circulation and remains untrue at present and which untruth, defendant Dun & Bradstreet would have discovered in the event it undertook any investigation of the matter.

5. In addition to the matters complained of in the preceding paragraph, by special notice dated July 26, 1976, defendant Dun & Bradstreet grossly misrepresented the assets and liabilities of the corporation and said misrepresentation was done in a careless and negligent manner with reckless disregard for the truth. Defendant Dun & Bradstreet undertook no investigation or examination of the truth of the matters asserted by it and had such investigation been undertaken the true state of the plaintiff's assets and business affairs would have been revealed.

6. As a direct and proximate result of the acts and omissions of the defendant as aforesaid, and as a further and direct and proximate result of its reckless disregard for the truth, plaintiff Greenmoss Builders, Inc., and plaintiff John Flanagan have suffered damage, embarrassment, humiliation, injury and loss to

their business reputations and status and standing in the community.

7. The false and defamatory statements referrred to in Paragraphs #4 and #5 were published and circulated by defendant Dun & Bradstreet to members of the public and since they affect the plaintiffs in their trade or business, said erroneous statements constitute defamation and libel per se.

WHEREFORE, each plaintiff demands the sum of Seven Thousand Five Hundred ($7,500.00) Dollars each in compensatory damages and each plaintiff demands the sum of Fifteen Thousand ($15,000.00) Dollars each in punitive or exemplary damages from defendant.

Pursuant to Rule 38 V.R.C.P. plaintiffs Greenmoss Builders Inc., and John Flanagan herein demand a trial by jury as of all issues triable in this cause.

Dated at City of Barre, County of Washington and State of Vermont this 13th day of October, 1977.

By: _____
THOMAS F. HEILMANN, ESQ.

STATE OF VERMONT
WASHINGTON COUNTY, SS

WASHINGTON SUPERIOR COURT
Docket No.: S-326-77Wnc

GREENMOSS BUILDERS, INC. and JOHN FLANAGAN

vs.

DUN & BRADSTREET, INC.

ANSWER

NOW COMES Dun & Bradstreet, Inc., by and through its attorneys Young & Monte, and for its answer to plantiffs' complaint says as follows:

FIRST DEFENSE

1. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 1 of plaintiffs' complaint and calls upon plaintiffs to prove the same.

2. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 2 of plaintiffs' complaint and calls upon plaintiffs to prove the same.

3. Defendant admits the allegations of Paragraph 3 of plaintiffs' complaint.

4. Defendant denies each and every allegation contained in Paragraph 4 of plaintiffs' complaint.

5. Defendant denies each and every allegation contained in Paragraph 5 of plaintiffs' complaint.

6. Defendant denies each and every allegation contained in Paragraph 6 of plaintiffs' complaint.

7. Defendant denies each and every allegation contained in Paragraph 7 of plaintiffs' complaint.

SECOND DEFENSE

8. This court lacks jurisdiction over the subject matter of this cause and lacks jurisdiction over the person of the defendant.

THIRD DEFENSE

9. The complaint fails to state a claim upon which the plaintiff, John Flanagan, can be granted relief against the defendant.

FOURTH DEFENSE

10. The complaint fails to state a claim upon which the plaintiff, Greenmoss Builders, Inc., can be granted relief against the defendant.

FIFTH DEFENSE

11. Any allegedly defamatory statement which the plaintiffs claim was made by the defendant and is the cause of any alleged injury to the plaintiffs was made by the defendant in good faith in the course of its business as a commercial credit rating and reporting agency, and any such allegedly defamatory statement was made by the defendant only in response to a legitimate request for credit information made of the defendant by one of its subscribers. Any such alleged defamatory statement is therefore the subject of a

privelege, which privelege the defendant claims the benefit of.

SIXTH DEFENSE

12. All statements allegedly made by defendant pertaining to plaintiffs were true.

WHEREFORE, defendant prays:

1. The plaintiffs' complaint be dismissed.

2. That plaintiffs be ordered, pursuant to Rule 9(b), to plead with more particularity the statements alleged to have been made by defendant which were defamatory.

3. That judgment be entered for the defendant.

4. That defendant be awarded its costs, including a reasonable attorney fee.

5. For such other and further relief as is just.

DATED at Northfield, County of Washington and State of Vermont this 18th day of November, 1977.

DUN & BRADSTREET, INC.
By Its Attorneys
YOUNG & MONTE

By _____
Peter J. Monte, Esquire

STATE OF VERMONT
WASHINGTON SUPERIOR COURT
(Title omitted in printing)

DUN & BRADSTREET, INC. **SPECIAL NOTICE**

D-U-N-S

No. 06-675-5349 Jul. 26, 1976 Rating NQ
Greenmoss Builders Inc. Formerly
Building Contractor EE2
Box 517 Started 1971
RTE #100 SIC Nos.
Waitsfield, VT 05673 15 22 15 42 15 31
Tel. 802 496-3124

PETITION UNDER NATIONAL BANKRUPTCY ACT

Voluntary Petition In Bankruptcy Filed Under Chapter IV

Date of Filing: July 1, 1976 Case # 76-201

City & State Filed:
Burlington, VT

Plaintiff's 2

Filed By: Richard Brock

LIABILITIES:
Total: $ 37,729

ASSETS:
Total: 26,835

Attorney: Richard Brock, Box 725, Montpelier, VT
Referee: Charles J. Marro, Merchants Row, Rutland, VT

07-28(76 /34) 0056/02 6 092

This report is submitted only to J. Flanagan for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within 7 days.

STATE OF VERMONT
WASHINGTON SUPERIOR COURT
(Title omitted in printing)

DUN & BRADSTREET, INC. **SPECIAL NOTICE**

D-U-N-S

No. 06-675-5349 Aug. 3, 1976 Rating —
Greenmoss Builders
Inc.

Building Contractor Started 1971

Box 357
Rte. #100 SIC Nos.
Waitsfield, VT 05673 15 22 15 42 15 31
Tel. 802 496-2561

Plaintiff's 3

CORRECTION CORRECTION CORRECTION

Any report to the effect that this corporation filed a voluntary petition in bankruptcy on July 1, 1976 under Chapter IV, file number 76-201 is erroneous and should be disregarded. The facts are that the bankruptcy was filed individually by an employee of this corporation. Greenmoss Builders Inc. continues operations as previously reported.
08-03(13 /29)0176/06 41501 6 092

This report is submitted only to _____ for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within ___ days.

STATE OF VERMONT
WASHINGTON SUPERIOR COURT
(Title omitted in printing)
EXCERPTS FROM INSTRUCTIONS TO JURY

* * *

[Tr. 484] Now in this case I'm going to discuss with you the defamation aspects of it and the damage questions that may be related to it. The Plaintiff, as you know, Greenmoss Builders, Inc. has filed suit seeking compensatory and punitive damages on account of an alleged libel and defamation in the form of a Report **[Tr. 485]** issued by Dun & Bradstreet on July 26, 1976 in which it was erroneously reported that the Plaintiff had filed for bankruptcy. A libel is a false and defamatory statement negligently or recklessly published of and concerning the Plaintiff which tends to injure its reputation in the eyes of a substantial, respectable group, even though they are a minority of the total community, or of the Plaintiff's associates. A corporation is deemed a person under our law, and like a person, a corporation may be the subject of a libel. The Defendant in this case has conceded that the report of Plaintiff's bankruptcy was false and erroneous; that the Report was published to others by the Defendant is also uncontested. Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous per se. This means that the Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed. In the present case, I instruct you that the Defendant's Erroneous Report of the Plaintiff's bankruptcy constitutes libel as a matter of law unless you find that the Defendant was privileged to make that Report and publish

it to subscribers. Under the law, a commercial credit rating agency enjoys a qualified privilege in making reports to **[Tr. 486]** its subscribers. This means that a commercial credit rating agency cannot be held accountable for erroneous statements which are merely negligent. This is because commercial rating agencies are deemed to serve a legitimate business need which might not be met in the absence of the privilege. The Defendant has the burden of proving that it is a commercial credit rating agency, and I don't think there's any dispute about that in this case. If you determine that the Defendant is a commercial credit rating agency, the qualified privilege will apply; however, this is but a qualified privilege. If a commercial credit rating agency publishes an Erroneous Report to customers other than those who had recently requested credit information regarding the subject of a report, the agency has abused the privilege and may be held liable. In addition, if an Erroneous Credit Report is maliciously or recklessly made by a commercial rating agency, the agency is not entitled to the protection of that privilege. So in terms of the case before you, if you determine that the Defendant is ordinarily covered by the qualified privilege you must then determine whether that privilege has been abused, either by excessive publication to customers who have not requested credit information regarding the Plaintiff, or by malicious or reckless publication of the report. The Plaintiff has the burden of proving **[Tr. 487]** that the privilege has been destroyed. The conduct which would destroy the qualified privileges of a commercial credit agency must be more than mere negligence or want of sound judgment. It must show malice or lack of good faith on the part of the Defendant. If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that

Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it.

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be **[Tr. 488]** awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

Now a word or two about punitive damages. If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed. Punitive damages are designed to punish the offender and serve as [Tr. 489] an example to others. Whether or not to award such damages and to the amount thereof are matters confided solely to you for decision. In considering whether Defendant acted with actual malice so as to support an award of punitive damages, you may consider the conduct of the Defendant both before and after the publication of the Erroneous Report. In considering whether or not to award punitive damages, you may take into account whether Defendant took any steps to mitigate or reduce the injury to the Plaintiff. If you find the Defendant attempted to mitigate damages, you must lessen your award of damages to the extent that you believe appropriate under the circumstances.

Now in defamation actions, the law requires that you consider whether the Defendant has taken any steps to mitigate damages. Mitigation of damages is action taken by the Defendant to lessen the extent or severity of the injuries sustained by the Plaintiff because of Defendant's conduct. If you find that the Defendant took steps to alleviate damages or lessen the extent or severity of Plaintiff's damages, then you must take this mitigating conduct of the Defendant into account in determining the amount of damages and you must lessen your award as I've indicated to the extent that you believe is appropriate in all the circumstances.

[Tr. 490] Now ordinarily in a civil case one is not allowed to bring before the the jury the wealth of the Defendant or even to make any suggestions as to the wealth of the Defendant. And in considering whether or not Defendant is liable, you may not take into account Defendant's wealth. In considering what compensatory damages must be, if you reach that question, you may not take into account Defendant's wealth, but if you feel that there has been such outrageous conduct as would warrant punitive damages, then and only then may you take into consideration the wealth of the Defendant.

* * *

STATE OF VERMONT
WASHINGTON COUNTY, SS.

GREENMOSS BUILDERS, INC.	)	WASHINGTON SUPERIOR COURT Docket No. S-326-77Wnc
vs	)	
DUN & BRADSTREET, INC.	)	

JUDGMENT

This action came on for trial before the Court and a jury, Thomas L. Hayes presiding, and the issues having been duly tried and the jury on April 10, 1980, having rendered a verdict for the plaintiff to recover of the defendant damages in the amount of $350,000.00,

It is ORDERED and ADJUDGED that the plaintiff recover of the defendant the sum of $350,000.00 and its costs of action.

Dated at Montpelier, Vermont this 21st day of April, 1980.

Thomas L. Hayes
Hon. Thomas L. Hayes

Willis C. Bragg
Hon. Willis C. Bragg

Patricia B. Jensen
Hon. Patricia B. Jensen

STATE OF VERMONT
WASHINGTON COUNTY ss.

GREENMOSS BUILDERS	SUPERIOR COURT WASHINGTON COUNTY
V	
DUN & BRADSTREET	DOCKET NO. S326-77WnC

ORDER

The above-entitled cause came on for hearing before the Washington Superior Court on defendant's Motion for: Judgment for the defendant notwithstanding the verdict; for judgment on the issue of punitive damages notwithstanding the verdict; for judgment on the issue of a compensatory damages notwithstanding the verdict; and for a new trial of all issues in the above-captioned matter.

The Court has reviewed the instructions given the jury in this cause, and memoranda submitted, and has considered the evidence of record, the verdict rendered by the jury and the applicable law.

We are persuaded that the evidence is sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages. Therefore, all motions for judgment notwithstanding the verdict must be denied.

The more troublesome question is whether defendant should prevail on its motion for a new trial.

The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language

in the charge may have misled the jury to believe that damages were presumed in some amount in the case.

The United States Supreme Court held in *Gertz v. Robert Welch*, 418, U.S. 324:

> "The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

In view of the foregoing, it is hereby ORDERED and ADJUDGED:

1. That all motions of the Defendant for judgment notwithstanding the verdict are DENIED.

2. That Defendant's motion for a new trial on all issues is GRANTED.

Dated at Montpelier, County of Washington, this 19th day of October 1980.

Thomas L. Hayes
Superior Judge

Willis C. Bragg
Assistant Judge

Patricia B. Jensen
Assistant Judge

STATE OF VERMONT
WASHINGTON COUNTY, SS.

GREENMOSS BUILDERS, INC.	)	
	)	WASHINGTON
	)	SUPERIOR
V.	)	COURT
	)	DOCKET NO.
DUN & BRADSTREET	)	S326-77 WnC

ORDER

The above-entitled cause came on before the Washington Superior Court on Plaintiff's Petition for Permission to Appeal, which petition was opposed by the Defendant. However, the Defendant requested that, if this Court grants permission for an interlocutory appeal, that said appeal include certain questions specified by the Defendant.

The Court finds, after considering the petition and the alternative requests made by the Defendant, that there exist controlling questions of law as to which there is substantial ground for difference of opinion concerning the Court's October 19, 1980 Order granting Defendant's motion for a new trial on all issues. The Court also finds that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. Accordingly, it is hereby ordered and adjudged that the Plaintiff's Motion for Permission to Appeal and the alternative requests of the Defendant are granted to the extent set forth below. The Clerk shall proceed as provided in Rules 3e and 5b (3) of the Vermont Rules of Appellate Procedure.

The controlling questions of law are as follows:

1. Did the Court err in granting Defendant's motion for a new trial on all issues?

2. If the answer to the previous question is in the affirmative, should the Court have entered judgment on the verdict?

3. If the answer to Question No. 1 is in the affirmative, should the Court have ordered a new trial on:

a) damages only?;

b) compensatory damages only?;

c) punitive damages only?

4. Did the Court err in denying all motions of the Defendant for judgment notwithstanding the verdict?

5. If the answer to the previous question is in the affirmative, should the Court have:

a) granted Defendant's Motion to enter judgment for the Defendant on the issue of punitive damages, notwithstanding the verdict?;

b) granted the motion of the Defendant for judgment on the issue of compensatory damages, notwithstanding the verdict?;

c) granted judgment for the Defendant on all issues?

Dated this 26th day of April, 1981.

Thomas L. Hayes
Superior Judge

Willis C. Bragg
Assistant Judge

Patricia B. Jensen
Assistant Judge

SUPREME COURT OF THE STATE OF VERMONT

ENTRY ORDER

SUPREME COURT DOCKET NO. 173-81
NOVEMBER TERM, 1982

	APPEALED FROM:
Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.	Washington Superior Court DOCKET NO. S326-77WnC

In the above entitled cause the Clerk will enter:

Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.

FOR THE COURT:

Dissenting:

William C. Hill
WILLIAM C. HILL,
Associate Justice

Concurring:

Albert W. Barney
ALBERT W. BARNEY,
Chief Justice

Franklin S. Billings, Jr.
FRANKLIN S. BILLINGS, JR.,
Associate Justice

Wynn Underwood
WYNN UNDERWOOD,
Associate Justice

Louis P. Peck
LOUIS P. PECK,
Associate Justice

No. 173-81

Greenmoss Builders, Inc. Supreme Court

v. On Appeal from Washington Superior Court

Dun & Bradstreet, Inc. November Term, 1982

Thomas L. Hayes, J.
Villa & Heilmann, Burlington, for plaintiff-appellant
Young & Monte, Northfield, for defendant-appellee

PRESENT: Barney, C.J., Billings, Hill, Underwood and Peck, JJ.

HILL, J. Plaintiff, a residential and commercial building contractor, brought this defamation action against defendant as a result of an erroneous credit report issued to defendant's subscribers (plaintiff's creditors). The credit report alleged that plaintiff had filed a voluntary petition in bankruptcy and, in addition, grossly misrepresented plaintiff's assets and liabilities. The false nature of the report's allegations has never been disputed.

In its complaint, plaintiff asserted that the consequences of defendant's report, which it insisted was published with reckless disregard for truth and accuracy, were a damaged business reputation, loss of company profits, and loss of money expended to correct the error. In response, defendant claimed both a constitutional and common law qualified privilege against defamation actions, and on that basis contended that since its report was published in good faith, it could not be held liable.

After a trial by jury, a verdict was returned in favor of plaintiff for $50,000 in compensatory or actual damages, and $300,000 in punitive damages. Thereafter, defendant filed timely motions for judgment notwithstanding the verdict, V.R.C.P. 50, and for new trial, V.R.C.P. 59, on the issues of liability and damages. The trial court, persuaded that the evidence was sufficient as a matter of law to create issues of fact for the jury as to both liability and damages, denied defendant's motions for judgment notwithstanding the verdict. Upon reviewing its jury instructions, however, the trial court concluded that it had incorrectly charged those standards of liability enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and granted defendant's motions for new trial on all issues.

This action is before us pursuant to an Interlocutory Order by the Washington Superior Court, V.R.A.P. 5(b)(1), certifying five questions of law for our resolution. (1) Did the trial court err in granting defendant's motion for a new trial on all issues? (2) If the answer to the first question is in the affirmative, should the court have entered judgment on the verdict? (3) If the answer to the first question is in the affirmative, should the court have ordered a new trial on: (a) damages only? (b) compensatory damages only? (c) punitive damages only? (4) Did the court err in denying all motions of the defendant for judgment notwithstanding the verdict? (5) If the answer to the fourth question is in the affirmative, should the court have: (a) granted defendant's motion to enter judgment for the defendant on the issue of punitive damages, notwithstanding the verdict? (b) granted the motion of the defendant for judgment on the issue of compensatory damages, notwithstanding the verdict? (c) granted judgment for the defendant on all issues? In light of

our disposition of the first four questions, we need not address the fifth question.

We begin with a review of the record. Defendant operates a business in which factual and financial reports about individual business enterprises are issued exclusively to subscribers of defendant's service. These subscribers, usually creditors of the reported enterprises, may contract for "continuous service reports" which enable them to receive all report updates about a particular business over a year's time from the subscriber's initial inquiry. The reports are based on information solicited from the business itself, the business' banking and credit sources, from trade suppliers, and from public records such as annual reports filed with the Secretary of State and reports of bankruptcy petitions.

On or about July 26, 1976, plaintiff's president met with a representative of its principal creditor, a bank, to discuss the possibility of future financing. During the meeting, the bank's representative informed plaintiff's president that he had just received a credit report issued by defendant indicating that plaintiff had recently filed a voluntary petition in bankruptcy. Plaintiff's president testified that he was both shocked and confused when confronted with the report, since plaintiff had never filed such a petition and, at the time the report was published, plaintiff's business was steadily expanding. In fact, plaintiff's president later testified that prior to the issuance of the credit report, plaintiff had never suffered a major economic reversal and its financial condition was sound. Nevertheless, despite the bank representative's trial testimony that he never really believed the report, the bank put off any future consideration of credit to plaintiff until the

discrepancy was cleared up. The bank later terminated plaintiff's credit allegedly for reasons unrelated to the report.

Plaintiff's president immediately contacted defendant's regional office in Manchester, New Hampshire. He explained the error to defendant's regional supervisor and requested, in addition to an immediate correction, a list of those creditors who had received the false reports in order that they might be reassured of plaintiff's solvency. Defendant's representative stated that the matter would be looked into, but refused to divulge to plaintiff's president the names of the creditors who had received the report.

The basis of the error was established at trial: a former employee of plaintiff, and not plaintiff, had filed a voluntary petition in bankruptcy. Defendant's employee, a seventeen year old high school student, paid $200 annually to review Vermont's bankruptcy petitions, had inadvertently attributed the former employee's bankruptcy petition to plaintiff itself, and reported the information as such to defendant. A representative of defendant testified that prior to the issuance of a credit report indicating a bankrupt business, it was defendant's routine practice first to check the report's accuracy with the business itself. No prepublication verification was ever attempted in the present case.

On or about August 3, 1976, having satisfied itself that its credit report on plaintiff was wrong, defendant issued a corrective notice to the five subscribers who had received the initial report. In substance, the corrective notice stated that it was a former employee of plaintiff, not plaintiff itself, who had filed the petition in bankruptcy, and that plaintiff "continued in busi-

ness as usual." Plaintiff informed defendant that it was dissatisfied with the corrective notice, since it implied that the initial mistake was attributable to plaintiff, not defendant. Plaintiff again demanded a list of subscribers who had seen the report, but its request was once again denied.

Thereafter, plaintiff refused to provide defendant with any further financial data, and requested that defendant inform anyone seeking such data that it was being withheld pending the outcome of plaintiff's defamation action against defendant. Instead, defendant issued plaintiff a "blank rating," indicating that plaintiff's circumstances were "difficult to classify" within defendant's rating system, and such information was distributed to those creditors who requested a current indication of plaintiff's financial status. A short while later, plaintiff commenced its defamation action.

I.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that a "public official" was prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he [or she] proves that the statement was made with 'actual malice,' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80; *Burns v. Times Argus Association*, 139 Vt. 381, 384, 430 A.2d 773, 775 (1981). Three years later, the media protection established in *New York Times* was extended to cover defamatory falsehoods published about "public figures." *Curtis Publishing Company v. Butts*, 388 U.S. 130, 155 (1967). In *Gertz v. Robert Welch, Inc., supra*, the Supreme Court, in the last major pronunciation of protections afforded the media in defamation actions,

held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 347 (emphasis added). Although *Gertz* permitted a "private individual" to recover actual damages, presumed or punitive damages were not permitted absent proof of the *New York Times* standard "of knowledge of falsity or reckless disregard for the truth." *Id.* at 348.

The critical issue underlying the certified questions presented, a matter of first impression for this Court, is whether the First and Fourteenth Amendments to the United States Constitution require that the qualified protections afforded the media in "private" defamation actions, as set forth in *Gertz*, be extended to actions involving nonmedia defendants. Although the issue has never been decided by the United States Supreme Court, see *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979), it has been addressed in a number of state courts. See, e.g., *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Jacron Sales, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975). Since the basis of the trial court's decision to grant a new trial was its allegedly faulty jury instruction regarding the *Gertz* standards of liability and damages, a threshold determination as to *Gertz*'s applicability to the facts of this case is crucial.

In support of its claim that *Gertz*, as a matter of federal constitutional law, should apply to nonmedia as well as media defendants, defendant asserts that the former have equally compelling First Amendment

rights worthy of constitutional protection, and as such it questions the logic of affording the press exclusive immunity from the consequences of defamation. Additionally, defendant insists that distinctions between media and other information disseminating defendants are quite often illusory, and concludes that it should be considered a "publisher or broadcaster" for purposes of First Amendment protection.

We are fully aware that in certain instances the distinction between media and nonmedia defendants may be difficult to draw. However, no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services. As a result of a contractual arrangement between defendant and its subscribers, the procured information is to be kept confidential. There is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. We therefore reject, as have the majority of circuit courts, the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny. See, e.g., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir.), *cert. denied*, 415 U.S. 985 (1973); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1383 (7th Cir. 1972); *Kansas Elec. Supply Co., Inc. v. Dun & Bradstreet, Inc.*, 448 F.2d 647, 649 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971).

Moreover, in carefully surveying the decisions of those jurisdictions which have specifically addressed the issue of whether *Gertz* should be applied to nonmedia defendants, we note that the majority have refused such an extension. Although we are not bound by these decisions, their reasoning is both persuasive and compelling. In nonmedia defamation actions, "[t]he crucial elements . . . which brought the United States Supreme Court into the field of defamation law are missing. There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Harley Davidson Motorsports, Inc. v. Markley, supra*, 279 Or. at 366, 568 P.2d at 1363. Consequently, the Supreme Court of Oregon concluded:

> Because a private individual's right to recover for libel has been made more difficult in situations in which his interests have been at least partially outweighed by important constitutional values, it does not follow, for obvious reasons, that his recovery should be made more difficult in situations in which no such constitutional values are involved merely for the sake of securing symmetry of treatment of defendants. It is our conclusion that Gertz does not require application of the constitutional privilege to actions of defamation between private parties insofar as the issues raised here are concerned.

Id. at 370-71, 568 P.2d at 1365. For other cases holding *Gertz* inapplicable to nonmedia defamation actions, see generally *Denny v. Mertz, supra; Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981); *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980);

Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056 (1979); *Rowe v. Metz, supra; Retail Credit Company v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975); *cf. Jacron Sales Company, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975); Restatement (Second) Torts § 480B, Comment e.

In light of the above, we are convinced that the balance must be struck in favor of the private plaintiff defamed by a nonmedia defendant. "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues . . . ." *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 340 (quoting *New York Times v. Sullivan, supra*, 376 U.S. at 270). Accordingly, we hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

II.

In the alternative, defendant contends that in the absence of a constitutional mandate, this Court should nevertheless adopt *Gertz* in the interests of fairness, simplicity and clarity in our state common law. Defendant's argument is based on the fear that without a heightened standard of protection in defamation actions, individuals will withdraw from, rather than pay the price of entry into, "the marketplace of ideas." Moreover, defendant insists that our common law, like the common law in the vast majority of other jurisdictions, see Prosser, Law of Torts, c. 19, § 115 (4th ed. 1971) and cases cited in 30 A.L.R. 2d 776 (1953), has already recognized, at least implicitly, a qualified common law privilege for credit reporting agencies. We disagree.

In *Nott v. Stoddard*, 38 Vt. 25 (1865), this Court recognized that there are certain exceptions to our general common law rule that malice will be presumed when words are in themselves defamatory and thus actionable per se:

> Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character. In such cases malice must be proved by extrinsic evidence, or inferred as a matter of fact by the jury from the circumstances.

Id. at 32. Although we have never *expressly* denied credit reporting agencies a qualified privilege, we have done so implicitly: "[I]f the words impute some quality, the natural tendency of which is to impair the plaintiff's professional or business character, as insolvency to a merchant, . . . they are actionable . . . ." *Darling v. Clement*, 69 Vt. 292, 300, 37 A. 779, 781 (1897) (citations omitted).

In balancing the equities between a credit reporting agency and the individual it has defamed through a false credit report, we note that "[a]n individual living in a world more and more dominated by large commercial entities is less able to bear the burden of the consequences of a false credit or character report than the agency in the business of selling these reports." *Retail Credit Company v. Russel, supra*, 234 Ga. at 770, 218 S.E.2d at 58. In light of the fact that our common law has never recognized a qualified privilege against defamation actions for credit reporting agencies, and given the absence of compelling policy reasons to do so now, we decline to adopt the rules set forth in *Gertz* as part of our common law.

III.

With regard to the question of damages, we note that "the availability of both general and punitive damages in libel actions has not been rejected as a matter of constitutional law." *Michlin v. Roberts*, 132 Vt. 154, 163, 318 A.2d 163, 169 (1974). "When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation, but he is not required to rely solely upon the implications that are applicable and may present any evidence of competent character that is authorized by his pleadings, for the purpose of showing the extent of injury and the amount of the compensation that should be awarded." *Lancour v. Herald & Globe Association*, 112 Vt. 471, 475, 28 A.2d 396, 399 (1942) (citing *Nott v. Stoddard, supra*, 38 Vt. at 30).

Likewise, in accordance with this Court's belief that "[p]unitive damages are awarded to 'stamp the condemnation of the jury upon the acts of defendant on account of their malicious character,'" *Pezzano v. Bonneau*, 133 Vt. 88, 92, 329 A.2d 659, 661 (1974) (quoting *Goldsmith's Admr. v. Joy*, 61 Vt. 488, 500, 17 A. 1010, 1014 (1889)), their availability in defamation actions involving "malice" has never been questioned. *Lancour v. Herald & Globe Association, supra*, 112 Vt. at 478, 28 A.2d at 401 (citing *Smith v. Moore*, 74 Vt. 81, 86, 52 A. 320, 321 (1901)). Although each case stands upon its own facts, *Woodhouse v. Woodhouse*, 99 Vt. 91, 154, 130 A. 758, 788 (1925), we have indicated that "malice may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Shortle v. Central Vermont Public Service*

Corporation, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979) (citing *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921)); *Lancour v. Herald & Globe Association, supra*, 112 Vt. at 482, 28 A.2d at 402; *Woodhouse v. Woodhouse, supra*, 99 Vt. at 155, 130 A. at 788.

Since "punitive damages are incapable of precise determination, their assessment is 'largely discretionary with the jury,'" *Lanfranconi v. Tidewater Oil Company*, 376 F.2d 91, 96 (2nd Cir. 1967) (quoting *Gray v. Janicki*, 118 Vt. 49, 52, 99 A.2d 707, 709 (1953)), and said assessment will not be interfered with unless "manifestly and grossly excessive." *Pezzano v. Bonneau, supra*, 133 Vt. at 91, 329 A.2d at 661 (quoting *Gray v. Janicki, supra*, 118 Vt. at 52, 99 A.2d at 709). We have cautioned, however, that though "the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that it is the result of perverted judgment, accident or gross mistake." *Woodhouse v. Woodhouse, supra*, 99 Vt. at 157, 130 A. at 789.

IV.

Guided by the rulings and principles outlined above, we turn to the certified questions raised by both parties regarding the propriety of the trial court's refusal to set aside the jury verdicts, V.R.C.P. 50, as well as its decision to grant a new trial on all issues. V.R.C.P. 59. As a basis for its motions, defendant argued that the verdicts were not supported by the evidence, in that the *Gertz* standards had not been met, that they were the product of passion and not reason, and that they were clearly excessive. In its order, the trial court noted that it had reviewed the jury instructions, all

memoranda submitted, the evidence of record, the verdict rendered by the jury and the applicable law. Persuaded that the evidence was "sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages," the trial court denied defendant's motions for judgment notwithstanding the verdict.

Defendant contends that the trial court abused its discretion in denying defendant's motions to set aside the verdicts. A careful review of the record discloses that defendant failed to renew, at the close of all the evidence, its earlier motions for a directed verdict on the issues of liability and compensatory damages. Thus, defendant's motions for judgment notwithstanding the verdict as to these two issues were properly denied. *Proctor Trust Company v. Upper Valley Press, Inc.*, 137 Vt. 346, 349, 405 A.2d 1221, 1223 (1979); *Palmissano v. Townsend*, 136 Vt. 372, 375, 392 A.2d 393, 395 (1978); *Houghton v. Leinwohl*, 135 Vt. 380, 381-82, 376 A.2d 733, 735-36 (1977); V.R.C.P. 50(b).

In determining whether the trial court abused its discretion by refusing to set aside the punitive damages award on the grounds that it was excessive, this Court is "bound to indulge every reasonable presumption in favor of the ruling below, bearing in mind that the trial court was in a better position to determine the question." *Towle v. St. Albans Publishing Company, Inc.*, 122 Vt. 134, 142, 165 A.2d 363, 368 (1960) (citing *Lancour v. Herald & Globe Association, supra*, 112 Vt. at 483, 28 A.2d at 403). In short, defendant must show that the ruling is clearly untenable and without any reasonable basis of support in the record. *Id.* (citing *Stone v. Briggs*, 112 Vt. 410, 415, 26 A.2d

828, 831 (1942)); *Dashnow v. Myers*, 121 Vt. 273, 279, 155 A.2d 859, 864 (1959).

We are not persuaded that the trial court abused its discretion in denying defendant's motion to set aside the verdict as to the issue of punitive damages.[1] There was ample evidence in the record to enable the jury to conclude that defendant's conduct was insulting, reckless, and in total disregard of plaintiff's rights. *Shortle v. Central Vermont Public Service Corporation, supra*, 137 Vt. at 33, 399 A.2d at 518. As noted above, "the size of the verdict alone does not indicate passion or prejudice by the jury." *Pezzano v. Bonneau, supra*, 133 Vt. at 91, 329 A.2d at 661 (citing *Gray v. Janicki, supra*, 118 Vt. at 51, 99 A.2d at 709). We are not convinced that the trial court abused its discretion in denying defendant's motions for judgment notwithstanding the verdict on the issue of punitive damages. Accordingly, the fourth certified question for review, whether the trial court erred in denying all motions of defendant for judgment notwithstanding the verdict, is answered in the negative.

In the second part of its order, the trial court, persuaded that its jury instructions "permitted the jury to believe that damages could be awarded to the [p]laintiff for defamation absent proof of damages and absent a showing of a knowledge of falsity or reckless

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[1] In its brief, defendant contends for the first time on appeal that in the absence of evidence of corporate involvement, punitive damages may not be assessed. "[W]e have repeatedly held that issues not raised below, even those having a constitutional dimension, will not be considered when presented for the first time on appeal." *State v. Patnaude*, 140 Vt. 361, 368, 438 A.2d 402, 404 (1981) (citing *State v. Prue*, 138 Vt. 331, 331-32, 415 A.2d 234, 234 (1980)).

disregard for the truth by the [d]efendant," granted defendant's motion for new trial on all issues. That is, defendant's motion for new trial was granted on the basis of the trial court's belief that its charge to the jury, insofar as it related to the *Gertz* standards of liability, was confusing. In view of the fact that our decision today holds *Gertz* totally inapplicable to the present case, we find the error harmless. In fact, we have carefully reviewed the jury instructions, and in addition to being properly charged in line with our common law rules as to liability and damages, defendant was afforded a common law qualified privilege against credit report agencies along with the ill-charged constitutional privilege outlined in *Gertz*. In short, defendant has nothing to complain about, since it received two beneficial charges to which it was not entitled.

Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.

FOR THE COURT:

WILLIAM C. HILL
Associate Justice